RE KRISHNAN RENGASAMY, EX P ARAB MALAYSIAN CREDIT BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[BANKRUPTCY NO: 29-311-2000]
28 AUGUST 2001

BANKRUPTCY: *Notice - Substituted service - Application to set aside substituted service - Considerations - Whether order for substituted service must state period to lapse before it takes effect - Whether a mandatory requirement*

BANKRUPTCY: *Notice - Application to set aside - Proper procedure - Whether by way of r. 18 or r. 95 of Bankruptcy Rules 1969 - Whether must be by way of affidavit - Whether application by summons in chambers fatal*

CONTRACT: *Performance - Third party - Whether judgment debtor's debt extinguished - Nature of third party performance required - Whether performance must be complete - Whether must be within time - Contracts Act 1950, s. 42*

This was the judgment debtor's appeal against the dismissal of his application to set aside the order for substituted service as well as the bankruptcy notice. It was contended that the order for substituted service was incomplete because it did not state when the substituted service was deemed to be effected. In respect of the bankruptcy notice, the judgment debtor purportedly relied on r. 18 of the Bankruptcy Rules 1969 ('the Rules') and s. 42 of the Contracts Act 1950 ('the Act').

Held:

[1] It was sufficient to bring knowledge of the bankruptcy notice or notice of the bankruptcy notice to the judgment debtor. The order for substituted service need not prescribe a particular period to lapse for the substituted service to take effect. (p 801 d)

[2] Although an application for an order for substituted service may include a term that the substituted service is to take effect on a certain date or day, it is not a mandatory requirement and the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 do not contain such a requirement. (p 801 g)

[3] The proper procedure for an application to set aside a bankruptcy notice is set out in r. 95(1) of the Rules, *ie*, by way of the filing of an affidavit and not by way of a summons-in-chambers. (p 802 e-g)

[4] For s. 42 of the Act to apply, an agreement must have been achieved between the promise and the promisor, and there must have been complete performance by the third party. Here the performance was not done within the stipulated time and therefore s. 42 of the Act was not applicable. (p 803 d-f)

[Judgment debtor's appeal dismissed.]

Case(s) referred to:

Chan Kok Choon v. United Malayan Banking Corp Bhd [1998] 2 CLJ 731 ***(refd)***

Chinn Swee Onn v. Puchong Realty Sdn Bhd [1990] 1 CLJ 28; [1990] 1 CLJ (Rep) 44 ***(refd)***

Har Chandi Lal & Ors v. Sheoraj Singh 39 IC 343 ***(refd)***

Kamaruddin Mohamed v. United Motor Works (M) Sdn Bhd [1982] 1 MLJ 126 ***(refd)***

Kerpa Singh v. Bariam Singh [1965] 1 LNS 66 ***(refd)***

Letchumi Ammal v. Nam Fong Housing Sdn Bhd [1982] CLJ 295; [1982] CLJ (Rep) 168 ***(refd)***

North Borneo Trading Co (B) Sdn Bhd v. Henry Wong Tan Fook [1982] 1 MLJ 147 ***(foll)***

Porter v. Freudenberg [1915] 1 KB 857 ***(refd)***

Scott & English (Malaysia) Sdn Bhd v. Foo Thor Lombong Bijih Sdn & Anor [1985] 1 MLJ 73 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 3(2)(ii)

Bankruptcy Rules 1969, rr. 18(1), 95(1)

Contracts Act 1950, ss. 42, 64

Other source(s) referred to:

Pollock & Mulla, 9th edn, p 361

For the judgment debtor - Moses Susayan; M/s Ramiah, Moses & Partners

For the judgment creditor - Mariah Madiah; M/s WK Chan & Co

Reported by Yow Ting Fong

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal in encl. (11) by the judgment debtor to me as judge in chambers against the decision of the learned senior assistant registrar who had on 3 May 2001 dismissed with costs the judgment debtor's application by way of summons in chambers in encl. (8). *Vide* encl. (8), the judgment debtor sought, *inter alia*, an order that:

1. the order for substituted service dated 19 September 2000 be set aside; and

2. both the service of the bankruptcy notice and the bankruptcy notice dated 10 April 2000 be set aside.

Submission For Judgment Debtor

Encik Moses Susayan, learned counsel for the judgment debtor, submitted that the order for substituted service is incomplete as it did not state when the substituted service was deemed to be effected, as, according to him, the normal practice is to state a specific period after which it is deemed to be served. He added, however, that the contention by the judgment debtor is not so much of effecting sufficient or good service but for the purpose of determining the period for the judgment debtor to dispute the bankruptcy notice, in order to avoid the act of bankruptcy being committed. In the alternative, he submitted that the time is at large for the judgment debtor to dispute the bankruptcy notice.

In respect of the other prayer ie, to set aside the bankruptcy notice, he relied on r. 18 of the Bankruptcy Rules 1969 and not r. 95 thereof. He added that under s. 42 of the Contracts Act 1950, when the judgment creditor as promisee accepts performance of a promise from a third person, he cannot afterwards enforce it against the promisor.

Contention For Judgment Creditor

Cik Mariah bt. Madiah, learned counsel for the judgment creditor, submitted that the service of the bankruptcy notice is valid, having complied with Form 15 and it has successfully brought the bankruptcy notice to the judgment debtor. She argued that the bankruptcy notice is also valid.

In response to the judgment debtor's submission on s. 42 of the Contracts Act 1950, she submitted that the principal debtor did not have any plan to settle the debt and so s. 42 does not apply.

Decision Of The Court

The chronology of events has been carefully set out by the learned registrar and may be stated as follows:

Date	Event
10 April 2000	Judgment creditor issued bankruptcy notice against judgment debtor as a guarantor.
24 August 2000	Judgment creditor filed summons in chambers for an order for substituted service.
19 September 2000	Order for substituted service was granted.
5 February 2001	Affidavit of service of the bankruptcy notice was filed by the judgment creditor.

At the outset, upon a proper perusal of encl. (6) ie, the order for substituted service, it is clear that the substituted service was to be effected by:

(a) normal post to the last known address of the judgment debtor at d/a Powertek Sdn Bhd, Stesen Jenakuasa Eletrik, Telok Gong, Kuala Sg. Baru, 78200 Melaka;

(b) posting at the notice board of the court; and

(c) advertising in "The Star" newspaper.

The judgment debtor did not dispute that all the aforesaid methods have been effected by the judgment creditor and so pursuant to the said order for substituted service, I hold that the service is deemed to be good service.

The judgment debtor's attack is that the order for substituted service did not specify the period which was to elapse for the service to be effective and reliance was placed on the Federal Court decision in *North Borneo Trading Co (B) Sdn Bhd v. Henry Wong Tan Fook* [1982] 1 MLJ 147. In that case, the order effecting substituted service reads:

> IT IS ORDERED that the Bankruptcy Notice taken out by the creditor on 15 October 1980 be served on the Debtor by the same being published in one issue of the Sarawak Tribune and one issue of the Sarawak government Gazette and that such substituted service be deemed to be sufficient service of the Bankruptcy Notice and shall be deemed to have been effected on the day of publication of the said Bankruptcy Notice in the Sarawak government Gazette.

The central issue before the Federal Court was what constituted sufficient service of the bankruptcy notice when it is effected by way of substituted service. The Federal Court through the judgment of Abdul Hamid, FJ (later LP) said that two elements must be considered *viz.* (a) the term of the order and (b) the form to be used. In this connection the Federal Court held that looking at the order, it may appear that it is a term of the order that the bankruptcy notice itself be published and the form to be used is Form 15 in the Appendix to the Bankruptcy Rules 1969, and that the substituted service should be effected to bring knowledge of the bankruptcy notice or the notice of the bankruptcy notice to the debtor: *Porter v. Freudenberg* [1915] 1 KB 857, 889; *Kamaruddin bin Mohamed v. United Motor Works (M) Sdn Bhd* [1982] 1 MLJ 126. The Federal Court added that publication both in the Sarawak Tribune and the Sarawak Government Gazette was in conformity with Form 15, wherein it was stated that the bankruptcy notice had been issued in the High Court at Kuching and that the bankruptcy notice could be inspected by the debtor at the court, and so the Federal Court concluded that it was sufficient to bring knowledge of the bankruptcy notice or notice of the bankruptcy notice to the debtor. It is clear to me that the Federal Court did not say that the order for substituted service must perforce prescribe a particular period to lapse for the substituted service to take effect.

In the instant case, the term of the order for substituted service is sufficiently complied with when all the aforesaid three methods have been effected by the judgment creditor and that the judgment debtor has and indeed he has knowledge or notice of the said bankruptcy notice, as the judgment debtor has in his own affidavit at para. 3 admitted that he has received the bankruptcy notice by post on 17 January 2001 and knew of the same through the "The Star" newspaper.

Although an application for an order for substituted service may include a term that the substituted service was to take effect on a certain date or day, it is strictly not a mandatory requirement and I agree with the learned registrar that the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 do not contain such a requirement. I am therefore unable to find any merits in the submission advanced for the judgment debtor in respect of this issue.

The next issue raised for the judgment debtor relates to the prayer to set aside the bankruptcy notice and the challenge is launched by his learned counsel pursuant to r. 18(1) of the Bankruptcy Rules 1969, and that it is not an application by way of r. 95 thereof. He hastened to add that this challenge falls outside the scope of proviso (ii) to s. 3(2) which, he said, is a jurisdictional challenge. In order to achieve a proper understanding of this submission, it is essential to reproduce r. 18(1) as follows:

18. Applications to be made by summons in chambers

(1) Except where these Rules or the Act otherwise provide, every application to the court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.

The proper construction to be placed on r. 18(1) is that, as a general rule, every application to the court shall be made by summons in chambers supported by affidavit. However, two exceptions are inherent in r. 18(1), *viz.:*

(a) where the Bankruptcy Rules 1969 or the Bankruptcy Act 1967 otherwise provide, in which case, the specific mode of application under the said Rules or the said Act would apply; and

(b) where the Chief Justice (now the Chief Judge) otherwise directs, in which case that specific direction would apply.

On the other hand, r. 95(1) reads as follows:

(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

It is to be noted that r. 95(1) of the Bankruptcy Rules 1969 specifically provides for the procedure in an application to set aside a bankruptcy notice ie, by the filing of an affidavit, which shall operate as an application to set aside the bankruptcy notice. I am unable to agree with the submission of the judgment debtor's learned counsel that this application in encl. (8) is not an application by way of r. 95(1), *supra*. Enclosure (8) is an application to set aside the bankruptcy notice and so the proper procedure to comply with is that contained in r. 95(1) ie, by way of the filing of an affidavit and not by way of a summons in chambers. Be that as it may, although encl. (8) is by way of summons in chambers, which must in any event be supported by an affidavit and since there is no prejudice to the judgment creditor, I shall refrain from striking out encl. (8) on a mere technicality, but instead proceed to decide on the merits of the affidavit in support of the summons in chambers. That affidavit is encl. (9), which contains an exh. KR3 ie, a letter alleging that an agreement has been reached to settle the matter under consideration. Learned counsel relied on s. 42 of the Contracts Act 1950, which reads as follows:

42. Effect of accepting performance from third person

When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

It was argued for the judgment debtor that letter exh. KR3 of encl. (8) (which, be it noted, is actually encl. (9) ie, the affidavit in support) is the settlement agreement between the third person and the judgment debtor. However, a proper perusal of the said letter reveals that one Encik Siranathan s/o N Kandiah, the third person, "would like to propose a settlement on 31 July 2000 latest an amount of RM3,000 as upfront payment and monthly deduction of RM500 through my monthly salary deductions with my consent and my employer has agreed on the deduction. ... I hope this proposal will meet with your kind consideration." I agree with the finding of the learned registrar that this letter is merely the said Encik Siranathan's (the principal borrower's) proposal for settlement as opposed to a settlement agreement as contended by judgment debtor's learned counsel. In order to invoke s. 42, *supra*, an agreement must have been achieved between the promisee and the promisor and there must have been complete (as opposed to partial) performance by the third party. Even assuming that there was a settlement agreement (when actually there was no such agreement at all), there must be complete performance by the third party before s. 42 can apply: *Scott & English (Malaysia) Sdn Bhd v. Foo Thor Lombong Bijih Sdn & Anor* [1985] 1 MLJ 73 HC; *Har Chandi Lal & Ors v. Sheoraj Singh* 39 IC 343; *Pollock & Mulla* (9th edn) p. 361. A mere part performance in the form of payment of RM3,000 as an upfront and three instalments of RM500 each would not suffice to invoke s. 42, *supra*. In the instant case, no other payments were effected by the third party as proposed in the aforesaid letter. Therefore the performance was not done within the stipulated time, as promised in the said letter, in which case I hold that s. 42 does not apply: (see also *Letchumi Ammal v. Nam Fong Housing Sdn Bhd* [1982] CLJ 295; [1982] CLJ (Rep) 168).

In *Chinn Swee Onn v. Puchong Realty Sdn Bhd* [1990] 1 CLJ 28; [1990] 1 CLJ (Rep) 44 the facts showed that the judgment creditor had agreed to forebear to levy execution on the judgment against the debtor who had instructed a third party to pay the judgment debt by a monthly sum of RM2,000 until the decretal sums have been settled. There was clearly a settlement agreement and so the Supreme Court invoked s. 42.

Kerpa Singh v. Bariam Singh [1965] 1 LNS 66 FC, which was relied upon by the judgment debtor, was indeed a decision based on the construction of s. 64 of the Contracts Act 1950 and not on s. 42 thereof and is therefore in my view not of any assistance to the debtor.

Similarly, *Chan Kok Choon v. United Malayan Banking Corp Bhd* [1998] 2 CLJ 731, cited for the judgment debtor, did not appear to decide on the legal effect or implication of s. 42 which was never mentioned in the judgment of the Court of Appeal and so is not relevant to the issue for determination in the instant case before me.

Having regards to the respective submissions and the grounds of decision given by the learned registrar and in the light of the foregoing reasons, I am satisfied that the learned registrar has arrived at the correct decision which I therefore affirm. In the circumstances, I dismiss the judgment debtor's appeal in encl. (11) with costs.